

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	CASE NO. 1:18CR517-2
Plaintiff,)	
)	
v.)	JUDGE BENITA Y. PEARSON
)	
JOSEPH KYLE SANDERS,)	
)	
Defendant.)	ORDER [Resolving ECF Nos. 28 , 29 , 30]

Defendant Joseph Kyle Sanders moves the Court to suppress statements made during an interrogation ([ECF No. 28](#)), evidence derived from a search of his mother's cell phone ([ECF No. 29](#)), and evidence derived from a DNA test ([ECF No. 30](#)). The matters have been briefed,¹ and a hearing was held on February 21, 2019, at which the Court heard witness testimony and observed certain video evidence.

The United States alleges that, on July 11, 2018, at approximately 11:50 a.m., a Loan Max location in Cleveland Heights, Ohio, was robbed at gunpoint. [ECF No. 1-1](#). A high-speed car chase ensued, and the suspects' car crashed. [Id.](#) Cleveland Heights police officers caught one occupant (Sanders' co-defendant), but two other occupants fled on foot, apparently abandoning clothes and other items along the trail. [Id.](#); [ECF No. 30-1 at PageID#: 184](#). The following day, Sanders was arrested at his mother's house, and his mother gave the officers her cell phone and told them the pass code for the phone. [ECF No. 29-1 at PageID#: 176](#).

¹ Sanders filed briefs in support of his motions, and the Government responded to each. Sanders declined to file reply briefs.

(1:18CR517-2)

After he was arrested, Sanders was brought to the Cleveland Heights police station and interviewed by two FBI agents. [ECF No. 28](#). That same day and subsequently, a Cleveland Heights police officer swore two affidavits and applied for corresponding warrants: one to search Sanders' mother's cell phone ([ECF No. 29-1](#)), and another to collect a DNA sample from Sanders ([ECF No. 30-1](#)).

Facts are further described throughout this Order as relevant.

For the reasons stated below, the motion to suppress statements is granted in part, the motion to suppress phone-search evidence is denied, and the motion to suppress DNA evidence is denied.

I. Motion to Suppress Statements (ECF No. 28)

Sanders moves the Court to suppress statements he made during an FBI interrogation on two grounds. [ECF No. 28](#). First, he argues, his statements should be suppressed because the interrogation commenced before the FBI agents advised Sanders of his *Miranda* rights, and after so advising him, they continued with the same line of questioning they had already begun. Second, he argues, his statements should be suppressed because, despite several unambiguous, unequivocal requests for counsel, the FBI agents did not cease asking questions.

A. Background

Sanders was arrested and taken to an interview room in the Cleveland Heights Police station. While there, Sanders told the police officers (not the FBI agents) that he had a lawyer. [ECF No. 28 at PageID#: 162](#); [ECF No. 38 at PageID#: 231](#).

When two FBI agents entered the interrogation room, they introduced themselves to

(1:18CR517-2)

Sanders and began asking questions. First, they asked whether he goes by “Joseph” or “Kyle.”² He responded that he goes by “Joseph,” and nobody calls him “Kyle.” [ECF No. 28 at PageID#: 162.](#)

The interview continued:

Agent: “[Have] you ever heard of the Rack gang?”

Sanders: “I just got out.”

Agent: “Yeah, you were at juvenile, but I’m saying have you ever heard of the Rack gang, Rack, Rackman, you know who the Rackman is?”

Sanders: “No, I don’t. Who was that?”

Agent: “He is a guy who got killed in some, uh (**Sanders** interjects: “Where he from?”) gang violence while---he’s, uh, on the East side. 140th and St. Clair, I think.”

Sanders: “Oh.”

[ECF No. 38 at PageID#: 232](#); *see* [ECF No. 28 at PageID#: 163](#).

The FBI agent then asked whether Sanders grew up anywhere near 140th and St. Clair or a neighborhood known as “Thornhill.” Sanders said he did not. The agents asked what he meant when he said he “just got out,” and Sanders responded that he had just been released from juvenile detention on bond, and that he had been in court that morning. Sanders explained that, after his court appearance, he went to his mother’s house, where he was arrested. The FBI agent

² Defendant suggests that question was more substantive than it appears. The day before, the agents had discovered incriminating text messages addressed to “Kyle” on another suspect’s phone. [ECF No. 28 at PageID#: 162](#); [ECF No. 1-1 at PageID#: 5](#). Agent Hasty, not shying away from the inquiry on cross examination, acknowledged that another suspect had been communicating with a “Kyle,” and whether Sanders preferred to be called Kyle was “[p]otentially, but not necessarily” significant. The Court agrees.

(1:18CR517-2)

then advised Sanders of his *Miranda* rights, and Sanders signed a form acknowledging that the agents had read him his rights and that he understood those rights. [ECF No. 38-1](#).

With Sanders having denied that he preferred being called Kyle and denied having any familiarity with the Rack gang, the agents resumed the interrogation and explained that they had been investigating the Rack gang. The agents asked Sanders whether he went to Shaw High School. *Interrogation video*, 13:49:33-13:50:12. Sanders answered that he did, and the agents asked him about his academics and his activities in high school. Eventually, referring to the day of the alleged robbery, an FBI agent then asked, “Let’s talk about yesterday. How did your day start yesterday?” *Interrogation video*, 13:53:20.

During the remainder of the interrogation, Sanders four times mentioned the prospect of speaking with a lawyer. When the agents asked Sanders to consent to a DNA swab, he replied, (1) “Nuh uh, not ‘til my lawyer get here. I got a lawyer.” *Interrogation video*, at 14:05:30; [ECF No. 28 at PageID#: 163](#). After that comment, the agents left the topic of a DNA swab and asked about “that drive” in the Chrysler Pacifica, Sanders suggested, (2) “I could call my lawyer and he can come down here and we can talk? . . . You feel me?”³ *Interrogation video*, at 14:25:39. The agents did not directly respond. They continued asking questions and Sanders continued answering them. When the agents showed Sanders a text message from another suspect’s phone and asked him what it meant, Sanders again, in a questioning tone, said (3) “Man, can I just have

³ Sanders’ brief phrases this utterance differently. According to Sanders, he stated, “Can I call my lawyer to get down here, and we can talk?” [ECF No. 28 at PageID#: 164](#). On the video, it appears the Government’s rendition is mostly accurate. Sanders appears to say, “I can call my lawyer . . .”

(1:18CR517-2)

my lawyer with me while we're talking, know what I'm saying?" *Interrogation video*, at 14:29:07.

After this request, the agents explained the implications of requesting a lawyer. One said, "I mean, if you want your attorney here, then we have to discontinue the discussion." The other added, "And you're not going to hear everything that we've got to say." The first reiterated, "I would prefer to keep this conversation going 'cause I feel like we've got a lot to say." Sanders nodded, indicating agreement, and replied in effect, "Oh no. We can keep it going. . . . I'm still gonna tell you, you feel me?" He then continued to answer questions.

Later on in the interview, Sanders stated, (4) "I just want my lawyer or something. [He went on to say:] I ain't no juvenile. . . . Like, can I get my lawyer while we are talking?"⁴

Interrogation video, at 14:39:30. The agents again persisted in asking questions. *Id.*

B. Law and Analysis

1. Two-Step Interrogation

In support of his motion, Sanders points to a case in the Supreme Court and one in the Sixth Circuit that purportedly require suppression, under certain circumstances, of confessions made after a midstream *Miranda* warning. *See ECF No. 28 at PageID#: 165* (citing *Missouri v. Seibert*, 542 U.S. 600, 611-12 (2004) and *United States v. Ray*, 803 F.3d 244, 272-73 (6th Cir. 2015)). Sanders contends that, because the FBI agents advised Sanders of his *Miranda* rights after they had already asked substantive, potentially incriminating questions, then continued with

⁴ The Government has agreed to self-suppress Sanders' statements made after this request for counsel.

(1:18CR517-2)

the same line of incriminating questions after reading *Miranda*, all statements from the interrogation must be suppressed.

In *Missouri v. Seibert*, a police officer conducted a 30- to 40-minute interrogation of a suspect and elicited a full confession. [542 U.S. at 604-05](#) (plurality opinion). He then gave the suspect a 20-minute break, returned to the interrogation room, advised her of her *Miranda* rights, and returned to the same questions he had asked before the break. [*Id.*](#)

At the suppression hearing, Officer Hanrahan testified that he made a “conscious decision” to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question “until I get the answer that she’s already provided once.” He acknowledged that *Seibert*’s ultimate statement was “largely a repeat of information . . . obtained” prior to the warning.

[*Id.* at 605-06.](#)

A plurality of justices in *Seibert* concluded that the admissibility of statements given after midstream *Miranda* warnings hinges on whether “a reasonable person in the suspect’s shoes could have seen the station house questioning as a new and distinct experience [from the initial questioning], and whether the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.” [*Id.* at 616](#). That test was explicitly adopted by a Sixth Circuit panel as the law of the circuit in [*United States v. Ray*, 803 F.3d at 272](#).

Seibert and *Ray* are not factually similar to Sanders’ case. In Sanders’ case, although the FBI agents asked arguably substantive, potentially incriminating questions prior to reading *Miranda*, they did not elicit any incriminating responses that were subsequently repeated post-*Miranda*.

(1:18CR517-2)

Pre-*Miranda*, the agents asked Sanders whether he went by “Joseph” or “Kyle,” but theys did not return to the subject after advising on *Miranda*. Also pre-*Miranda*, the agents asked Sanders whether he was familiar with the “Rack” gang. Sanders denied any such knowledge. Although the agents again mentioned the “Rack” gang after giving a *Miranda* warning, they simply provided information about the gang rather than ask Sanders further questions about it.

Unlike in *Seibert* and *Ray*, Sanders had not provided any pre-*Miranda* answers or “admissions” that he might have felt compelled to repeat post-*Miranda*, and the post-*Miranda* questions did not arise from any knowledge gleaned during the initial questioning. *United States v. Pacheco-Lopez*, 531 F.3d 420, 428 (6th Cir. 2008). *Seibert* and *Ray* instruct the Court to inquire whether a reasonable person in Sanders’ shoes would have perceived that he had a genuine choice whether or not to follow up on an earlier admission. *Seibert*, 542 U.S. at 616; *Ray*, 803 F.3d at 272-73. By the time he was advised of *Miranda*, however, Sanders had not made any inculpatory admissions. Even to the extent he made non-inculpatory statements (relating to his preferred name and his unfamiliarity with the “Rack” gang), he had no occasion to repeat those statements post-*Miranda*. *Seibert* and *Ray*, therefore, have no application here.

2. Right to Counsel

“[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation.” *Davis v. United States*, 512 U.S. 452, 458 (1994); see *Edwards v. Arizona*, 451 U.S. 477 (1981). The suspect “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be

(1:18CR517-2)

a request for an attorney.” *Davis*, 512 U.S. at 459. To cause questioning to cease, a request for counsel must be unambiguous and unequivocal. *Smith v. Illinois*, 469 U.S. 91, 97-98 (1984).

“Simply mentioning the prospect of talking with an attorney, or waiting to talk until one is present, is not sufficient to put the agent on notice that a suspect has invoked his right to remain silent” or his right to an attorney. *United States v. Amawi*, 695 F.3d 457, 485 (6th Cir. 2012).

When a suspect merely “makes an ambiguous or equivocal reference to an attorney, there is no requirement that law enforcement cease questioning.” *Id.*

Courts vary on precisely what language and circumstances satisfy the standards of *Davis* and *Smith*, and the parties illustrate that variance in their briefs. See [ECF No. 28 at PageID#: 166](#); [ECF No. 38 at PageID#: 238-39](#); *see also* [Jon M. Sands & Kim Smith-Stout, Articulating Miranda: Graphic Ambiguities of What is an Unambiguous Request for Counsel](#), pp. 24-25, [Champion \(Dec. 2005\)](#). Suspects commonly find themselves subject to interrogation without a lawyer because their requests for counsel are insufficiently clear or assertive.

(1) “Nuh uh, not ‘til my lawyer get here. I got a lawyer.” (14:05:30)

This utterance, spoken in response to the FBI agents’ request for consent to take a DNA swab, was not a clear assertion of the right to counsel. Sanders simply “mention[ed] the prospect of talking with an attorney.” *See Amawi*, 695 F.3d at 485. He did not clearly assert his right to counsel, and the FBI agents were entitled to continue the interview after this utterance.⁵

⁵ Defendant mentions this utterance in his motion, but it is not until the next time that Sanders mentions counsel (*interrogation video*, at 14:25:39), that he claims he “invoked his right to counsel.” [ECF No. 28 at PageID#:164](#).

(1:18CR517-2)

(2) “I could call my lawyer and he can come down here and we can talk.” (14:25:39).

Sanders and the Government present different versions of this utterance. *Compare ECF No. 28 at PageID#: 164, 167; with ECF No. 38 at PageID#: 233, 238.* According to the Government’s brief, at 14:25:39 in the interrogation video, Sanders uttered, “I could call my lawyer and he can come down here and we talk. . . . You feel me?” According to Sanders’ brief, however, Sanders uttered, “Can I call my lawyer to get down here, and we can talk?”⁶ In any case, the Court finds it entirely reasonable for the agents to have understood Sanders to be suggesting an idea or asking a question, not unambiguously demanding counsel.

Regardless of which transcription is used, Sander’s utterance is not an unequivocal request for counsel. Here, the agents could reasonably have understood Sanders to be making a suggestion or posing a question about having a lawyer present. Whichever it was, it was not an unequivocal invocation of his right to counsel. Sanders’ utterance resembles the equivocal utterances in *Davis, 512 U.S. at 462* (“Maybe I should talk to a lawyer.”), *Amawi, 695 F.3d at 484* (“Is there a lawyer onboard [the airplane]?”); and *United States v. Mays, 683 F. App’x 427, 430, 432-33 (6th Cir. 2017)* (“I should really have a lawyer, huh?”). Even if Sanders’ rendition is accurate, his follow-up question: “You feel me?” adds ambiguity. After making the statement, Sanders continued answering questions, further suggesting that he was only floating ideas about being joined by counsel rather than affirmatively requesting one’s presence.

⁶ During the hearing, the video was played and it appears that Sanders starts, “I can call my lawyer . . .” and continues as the Government suggests.

(1:18CR517-2)

The FBI agents were not obligated to cease questioning Sanders until his lawyer arrived or he reinitiated questioning himself. Sanders' motion to suppress statements made after this utterance (*interrogation video*, at 14:25:39) is denied.

(3) “Man, can I just have my lawyer with me while we’re talking, know what I’m saying?” (14:29:07)

Four minutes later, in response to an incriminating question about a text message on another suspect's cell phone, Sanders asked, “Man, can I just have my lawyer with me while we’re talking, know what I’m saying?” *Interrogation video*, at 14:29:07.

The FBI agents responded matter-of-factly. One agent stated, “I mean, if you want your attorney here, then we have to discontinue the discussion.” The other added, “And you’re not going to hear everything that we’ve got to say.” The first agent followed up, “I would prefer to keep this conversation going, ‘cause I feel like we’ve got a lot to say.” [ECF No. 28 at PageID#: 164](#). Sanders chose to keep going, going as far as to state, in effect, “Oh, no. We can keep it going. . . . I’m still gonna tell you, you feel me?” The Government correctly points out that the interrogating agents had no obligation to ask clarifying questions in response to an ambiguous or equivocal request for counsel. [ECF No. 38 at PageID#: 238](#) (citing [Davis, 512 U.S. at 461-62](#));

(1:18CR517-2)

*see also [Amawi, 695 F.3d at 495](#).*⁷ Sanders kept talking. The agents were under no obligation to cease questioning him.

(4) “I just want my lawyer or something. I ain’t no juvenile. . . . Like, can I get my lawyer while we are talking?” (14:39:30)

The government agrees this is an unequivocal request for counsel and statements made after this point should be suppressed. Sanders’ inculpatory statements made after he uttered: “I just want my lawyer or something” are suppressed. This statement was a clear invocation, not a musing or question like those earlier made.

3. Conclusion

For the reasons above, Sanders’ motion to suppress based on an ineffective *Miranda* warning is denied. All statements made after Sanders uttered: “I just want my lawyer or something. I ain’t no juvenile. . . . Like, can I get my lawyer while we are talking?” (14:39:30) are suppressed.

II. Motion to Suppress Phone-Search Evidence (ECF No. 29)

Sanders also moves the Court to suppress evidence derived from a search of his mother’s cell phone. [ECF No. 29](#). Although the search was authorized by a warrant, Sanders argues that the affidavit supporting the warrant was so lacking in evidence that it could not possibly establish

⁷ Interrogating officers have no constitutional obligation to ask clarifying questions in response to an ambiguous or equivocal request for counsel. [Davis, 512 U.S. at 461](#). The Supreme Court and the Sixth Circuit have nevertheless counseled that “[c]larifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect’s statement regarding counsel.” *Id.*; see [Abela, 380 F.3d at 986](#) (quoting *Davis*).

(1:18CR517-2)

probable cause, and the officers could not reasonably have relied on the warrant in conducting the search.

To succeed on a motion to suppress based on the Fourth Amendment, a defendant must establish that he has standing to challenge the seizure or search in question. “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” *Alderman v. United States*, 394 U.S. 165, 174 (1969). “There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.”

Id. To challenge the constitutionality of a search, a defendant must establish that he has a reasonable expectation of privacy in the property seized and searched. *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring); *United States v. Hunter*, 550 F.2d 1066, 1074 (6th Cir. 1977).

To establish standing for his challenge, therefore, Sanders must show that he had a possessory interest in his mother’s cell phone. In his brief, Sanders characterizes the cell phone as his own. ECF No. 29 at PageID#: 170 (“[T]he officers arrested Mr. Sanders and seized his phone.”). He cites, however, to the affidavit supporting the search warrant, which clarifies that the cell phone belonged to Sanders’ mother, and that Sanders had merely “used the cell phone.” ECF No. 29-1 at PageID#: 176.

A defendant claiming standing in a Fourth-Amendment challenge has the burden of proof to establish such standing. *United States v. Holmes*, 537 F.2d 227, 232 (5th Cir. 1976) (citing *Jones v. United States*, 362 U.S. 257, 261 (1960), overruled on other grounds by United States v.

(1:18CR517-2)

Salvucci, 448 U.S. 83, 85 (1980)). Because Sanders does not demonstrate that he had a genuine possessory interest in his mother's cell phone, his motion to suppress evidence derived from the officers' phone search ([ECF No. 29](#)) is denied for lack of standing.

III. Motion to Suppress DNA Evidence (ECF No. 30)

Finally, Sanders moves to suppress DNA evidence collected by the Cleveland Heights police officers. [ECF No. 30](#). Although the DNA collection was authorized by a warrant, Sanders argues that the affidavit supporting the warrant was so lacking in evidence that it could not possibly establish probable cause, and the officers could not reasonably have relied on the warrant in collecting the DNA swab without Sanders' consent.

In support of his argument, Sanders attaches and cites to the affidavit supporting the search warrant. [ECF No. 30-1](#). He argues that the affidavit provided little or no factual basis on which the authorizing judge could have found probable cause to collect a DNA sample. [ECF No. 30](#). The affidavit supporting the warrant described the crime that took place, explained that the suspects, whoever they were, fled in a blue or black Chrysler Pacifica, and asserted that Sanders was the driver of the Chrysler Pacifica. [ECF No. 30-1](#). The affidavit, however, gave no indication how the affiant learned that Sanders was the driver of the fleeing vehicle. It merely stated, “[T]hrough the investigation it was learned that Joseph Kyle Sanders was the driver . . .” *Id.* Sanders contends that assertion invited the authorizing judge to draw a conclusion based simply on the affiant's “suspicions, beliefs, or conclusions, without . . . [any] underlying factual circumstances regarding veracity, reliability, and basis of knowledge.” [ECF No. 30 at PageID#: 178](#) (quoting *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996)). He argues that such

(1:18CR517-2)

a bare-bones conclusion cannot constitutionally support a warrant, and no officer could execute such a baseless warrant in good faith.

The Government rejoins that, even if Sanders' DNA evidence were illegally obtained by the Cleveland Heights police officers, it need not be excluded because it would inevitably have been legally collected by the FBI later on. [ECF No. 37 at PageID#: 213-215](#). “[T]he inevitable discovery exception to the exclusionary rule applies when . . . evidence discovered during an illegal search would have been discovered during a later legal search and the second search inevitably would have occurred in the absence of the first.” [*United States v. Kesthelyi*, 308 F.3d 557, 574 \(6th Cir. 2002\)](#) (citing [*Murray v. United States*, 487 U.S. 533 \(1988\)](#)).

On August 20, 2018, not knowing that the Cleveland Heights police officers had already collected a DNA swab from Sanders, an FBI agent swore an affidavit and obtained a warrant, independently of the Cleveland Heights earlier efforts, to collect Sanders' DNA. [ECF Nos. 37-3, 37-4](#). Whereas the Cleveland Heights police officer's affidavit asserted merely that “through the investigation it was learned” that Sanders was involved in the crime, the FBI agent's affidavit explained that Sanders was directly implicated by a co-defendant in a police interview. [ECF No. 37-3 at PageID#: 225, ¶¶ 14-15](#). The FBI agent's affidavit also explained that Sanders had since been interviewed and had confessed to his role in the Loan Max robbery. [*Id.*, ¶ 16](#).

Because the FBI agents independently collected and analyzed Sanders' DNA and Sanders does not challenge that collection, the Court need not assess whether the Cleveland Heights police officers' DNA swab was supported by probable cause. Sanders' motion ([ECF No. 30](#)) is

(1:18CR517-2)

denied because his DNA sample inevitably would have been legally obtained, and indeed was legally obtained, by the FBI.

IV. Conclusion

For the foregoing reasons, Defendant Joseph Kyle Sanders' motion to suppress statements ([ECF No. 28](#)) is granted in part, his motion to suppress phone-search evidence ([ECF No. 29](#)) is denied for lack of standing, and his motion to suppress DNA evidence ([ECF No. 30](#)) is denied on the basis that such evidence would inevitably have been legally collected later.

IT IS SO ORDERED.

March 6, 2019
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge